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No. 85-717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARTHUR QUILLER, LILLIE MAE QUILLER,
and all other Persons Similarly Situated,
Cross-Petitioners,

VS.

BARCLAYSAMERICAN/CREDIT, INC.,
Cross-Respondent.

On Cross-Petition for Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

CROSS-PETITIONERS' REPLY TO CROSS-RESPONDENT'S RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

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CROSS-PETITIONERS' REPLY TO CROSS-RESPONDENT'S RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

I. The Inconsistent Positions Now Being Advanced by BarclaysAmerican Demand a Response.

In BarclaysAmerican's response to the Quillers Cross-Petition for Writ of Certiorari, BarclaysAmerican requests on page 1 that this Court "deny" the Cross-Petition for Writ of Certiorari. However, on page 2 of that response, Bar-

claysAmerican argues that this Court should grant both the Petition and Cross-Petition for Writ of Certiorari. These inconsistent positions are reminiscent of the inconsistent positions initially taken by BarclaysAmerican that the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") was unconstitutional and that the law of South Carolina controls the validity of the Quillers' contract.[1]

The Cross-Petition filed by the Quillers is a cross-petition that has been filed pursuant to Rule 19.5 of this Court, and review is sought only if BarclaysAmerican's Petition for Writ of Certiorari is granted. See *Fea v. Algonquin Sng., Inc.*, 426 U.S. 548 (1976) at 560, note 11.

II. BarclaysAmerican has Made Statements Inconsistent with the Economic Impact Arguments that it is now Advancing before this Court.

BarclaysAmerican argues that to require that the "terms and conditions" of a credit sale contract grant to a mobile home purchaser the right to a notice of default and the right to thirty (30) days in which to cure that default prior to repossession, acceleration or foreclosure will create a flood of litigation.[2] Even though the panel opinion in *Quiller v. BarclaysAmerican/Credit, Inc.*, 727 F.2d 1067 (11th Cir. 1984), was first published on March 19, 1984, there just has not been a flood of litigation. The reason for that is that a

[1]See the *Quiller* Brief in Opposition to Petition for Writ of Certiorari in Case No. 85-541, Appendix B, pp.8a-9a.

[2]The case of *Dinkins v. First Carolina Finance Corp.*, CV 185-241 in the United States District Court for the Southern District of Georgia and referred to by BarclaysAmerican, involves a contract in which the finance company reserved for itself the right upon default to declare the unpaid installments "to be immediately due and payable." Furthermore, the finance company upon default reserved the right to "take immediate possession of the property, without demand, and without process . . ."

substantial number of banks, savings & loan associations and finance companies elected to continue to be governed by state law and others who wished to pay the price for preemption entered into contracts which included as "terms and conditions" provisions that were consistent with DIDMCA, § 501(c) and the consumer protection regulations set forth at 12 C.F.R. § 590.4.[3]

BarclaysAmerican's "flood gate" arguments are being made in order to buttress its position taken in its Petition for Writ of Certiorari that the potential *ad damnum* in the pending cases is in the hundreds of millions of dollars and that the monetary damages to creditors, including itself, will be "horrendous" and "mind boggling" (see BarclaysAmerican's Petition for Writ of Certiorari, pages 8, 29). Barclays American has made these same economic impact arguments before the United States Senate in its lobbying efforts to amend DIDMCA to allow it to now amend its contracts unilaterally.[4] While BarclaysAmerican makes

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[3]In 1980, the Georgia General Assembly responded to high interest rates by temporarily increasing the maximum time-price differential that could be charged on a new motor vehicle or mobile home from an 8% add-on rate to a 10% add-on rate. Ga. Laws 1980, p.523, amending O.C.G.A. § 10-1-33(a). This increase was made permanent in 1981. Ga. Laws 1981, p.703. A 10% add-on rate over a 15-year period equates to a rate equivalent to a simple interest rate of approximately 14%. The average long-term conventional home loan rate during 1980 was 12.3%, during 1981 was 14.1%, during 1982 was 14.5% and during 1983 was 12.1%. 1985 Statistical Abstract of the U.S., 105th Ed., U.S. Dept. of Commerce, Bureau of the Census.

[4]A draft of the proposed amendment to DIDMCA being urged by BarclaysAmerican is SLC Draft No. 089910.415. A hearing on this amendment was held before the Senate Subcommittee on Financial Institutions and Consumer Affairs on November 6, 1985. The *Columbus Enquirer*, Nov. 7, 1985, p.B-1. BarclaysAmerican now seeks an amendment which will allow it to continue to receive the highest long-

these economic impact arguments to this Court and to Congress, it has informed the Securities and Exchange Commission that the *Quiller* decision is not "material."[5] If this case has the "economic impact" which BarclaysAmerican has argued, then it would be considered "material" for purposes of reporting. *See S.E.C. v. Falstaff Brewing Corp.*, 629 F.2d 62 (D.C. 1980) at 70-73.

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term finance charges ever charged in connection with mobile home financing while granting it a pardon for previous violations of Georgia law. BarclaysAmerican obviously does not want this Court to decide the issues in this case and has utilized the time during which the mandate of the Eleventh Circuit has been stayed to continue to collect excessive finance charges from mobile home purchasers while seeking a legislative pardon for its failure to pay the price for preemption. The legislative pardon that BarclaysAmerican now seeks, if granted, will do nothing but create constitutional issues that are not now present. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

[5]While class action discovery in the *Quiller* case had not been completed prior to the District Court dismissing that action, discovery did reveal that there was 775 transactions that are the subject matter of this class action (R-1, p.179,¶ 3, Vol.2, p.433). The panel opinion of the Eleventh Circuit was rendered on March 19, 1984, and the *en banc* opinion was rendered by the Eleventh Circuit on July 8, 1985. The annual report of BarclaysAmerican Corporation, Form 10-K for the fiscal year ending December 31, 1984, revealed that the company did not consider any litigation to be "material" with respect to the assets of the business of the company as a whole. See Barclays American's Form 10-K filed with the Securities and Exchange Commission for the fiscal year ending December 31, 1984, p.10, Item 3, Commission File No. 1-7870. The Form 10-Q filed by BarclaysAmerican Corporation for the quarter ending September 30, 1985, is dated November 13, 1985 and reveals no such "material" litigation.

III. DIDMCA Requires that Preemption Contracts Contain Certain Consumer Safeguards Not Required in Non-preemption Contracts.

In enacting DIDMCA, 12 U.S.C. § 1735(f)-7(note), Congress could easily have enacted a short statute which preempted all state laws regulating the time-price differential on mobile home contracts or loans and nothing more. However, the preemption method chosen by Congress was not "absolute." DIDMCA, § 501(c), makes that clear by indicating that credit sales would not be preempted "unless the terms and conditions relating to such . . . credit sale . . . comply with the consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board (hereafter "FHLBB"). While Congress delegated substantial authority to the FHLBB, Congress mandated that consumers would be granted a "30 day notice prior to instituting any action leading to repossession or foreclosure." DIDMCA, § 501(c)(2). In proposing regulations, there was no question but that the contractual provisions of the agreements had to comply with the regulations. 45 Fed. Reg. 31122 (May 12, 1980); 45 Fed. Reg. 43681 (June 30, 1980). Mobile home finance companies had to make a choice at the time of the transaction and that choice could not be made by reserving in their forms all of the onerous rights permitted by state law while at the same time seeking the benefits permitted by federal law.

BarclaysAmerican refers to various Georgia statutes in support of its contention that the right to a notice of default and the right to cure a default within 30 days do not have to be contained in the contracts. O.C.G.A. § 44-14-162.2, dealing with non-judicial foreclosures of real estate in Georgia, is a statute involving *procedure*, governing the non-judicial foreclosure of deeds to secure a debt in Georgia. See, O.C.G.A. § 44-14-162.3(b). The power of sale which it regu-

lates is part of a party's contractual undertaking. *See Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977) at 359. Likewise, O.C.G.A. § 11-9-504(3), O.C.G.A. § 11-9-505 and O.C.G.A. § 10-1-36 merely govern *procedure* in connection with the disposition of collateral *after* repossession or the prerequisites for obtaining a deficiency judgment. Under Georgia law, notice of default and 30 days in which to cure a default in connection with preemption contracts simply is not a prerequisite to a finance company being able to take possession of the consumer's home, either by repossession or foreclosure, or to accelerate the unpaid balance unless the "terms and conditions" of the contract so provide. DIDMCA does not grant to the consumer any rights. The consumer is granted rights in the contract if the finance company elects to preempt state law and come within the scope of DIDMCA. The Georgia procedural statutes do not in any way limit the creditor's rights under his contract to repossess, foreclose or accelerate; they merely regulate procedure.

If BarclaysAmerican's position were meritorious, mobile home finance companies would not have to make an election at the time of the contract but would be free to either argue at a later date that the contract was a "preemption contract," a contract governed by "South Carolina law," or a contract governed by "Georgia law," whatever was most beneficial to the creditor at the time, much like BarclaysAmerican has done in this case. If so, the language contained in DIDMCA, § 501(c), would be meaningless.

BarclaysAmerican has stated that at the bottom left hand corner it referred to its contract as being a "preemption" contract. Labels chosen by the drafter of a contract do not control; rather, the "terms and conditions" show the intent of the parties. *American Standard Credit, Inc. v. National Cement Co.*, 643 F.2d 248 (5th Cir. 1981); *Citizens & South-*

ern Equipment Leasing, Inc. v. Atlanta Federal Savings & Loan Assn., 144 Ga.App. 800, 243 S.E.2d 243 (1978); *Fagelson v. Pfister Aluminum Corporation*, 109 Ga.App. 663, 137 S.E.2d 313 (1964); and *Suggs v. Brotherhood of Locomotive Firemen & Enginemen*, 106 Ga.App. 563, 127 S.E.2d 827 (1962).

BarclaysAmerican was not in a vacuum when it chose the wording of its contract of adhesion. A creditor's "right to repossess the collateral is the secured creditor's ultimate weapon against a defaulting debtor; in some instances the threat of repossession alone will be sufficient to persuade a misguided debtor to mend his ways ('If you don't pay up, I'll exercise my right to repossess your favorite hunting dog in whom I have a security interest')." White & Summers, *Uniform Commercial Code*, 2d Ed., § 26-5, p.1095 (West Publishing Company, 1979)." The language chosen by BarclaysAmerican allowed it to do just that and, in the case of the Quillers, the actions of BarclaysAmerican were inconsistent with any notice of default set forth in 12 C.F.R. § 590.4(h) and inconsistent with the right to cure within thirty (30) days set forth in DIDMCA, § 501(c)(2).

CONCLUSION

The Quillers have filed a Cross-Petition for Writ of Certiorari in order to preserve their right to argue that the "terms and conditions" of the credit sale contract have to grant a right to a notice of default and a right to thirty (30) days in which to cure the default if Georgia law is to be preempted. As BarclaysAmerican cannot recover under any theory that it has advanced before this Court and the granting of a petition for writ of certiorari in this case will allow BarclaysAmerican to have unfettered control over repossessions, foreclosures and accelerations against mobile home purchasers in Georgia, Cross-Petitioners re-

spectfully request that Barclays American's Petition for Certiorari be denied; however, if granted, Cross-Petitioners request that this Cross-Petition be granted.

Respectfully submitted,

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